

FCC 97-388

Mercury PCS II, LLC

Released: October 28, 1997

¹ Seven licenses were ultimately not sold. (BTA numbers 060, 155, 166, 199, 228, 233 and 301).

submit by July 29, 1996 an FCC Form 175. FCC Form 175 requires, among other things, a participant to identify the markets and frequency block/channels for which it intends to place bids and to identify the names of the participant's authorized bidders.² FCC Form 175 also contains a certification in which the auction participant certifies under penalty of perjury, that "it has not entered into and will not enter into any explicit or implicit agreements or understandings of any kind with parties not identified in [its] application regarding the amount to be bid, bidding strategies or the particular license on which the applicant or other parties will or will not bid."³

4. Mercury timely filed its FCC Form 175. In the form, Mercury indicated that it intended to bid for all frequency block/channels in the broadband PCS D, E, and F blocks. Mercury also identified Jerry M. Sullivan, Jr.; E. B. Martin, Jr.; and L. Susan Banes as authorized bidders for the company. William M. Mounger, II, an owner and the sole manager of the company, executed the certification on behalf of Mercury. Mercury certified in the affirmative that it had not and would not enter into any explicit or implicit agreement or understandings of any kind with parties not identified in its application regarding the amount to be bid, bidding strategies or the particular license on which it would or would not bid.

5. On November 26, 1996, during the auction, another bidder, High Plains Wireless L.P. ("High Plains") filed an Emergency Motion for Disqualification ("Emergency Motion") with the Commission alleging that Mercury was engaging in bidding behavior that communicated its bidding strategy to other bidders by placing "trailing number bids" while bidding for the F block licenses in the Amarillo, Texas and Lubbock, Texas markets. Specifically, High Plains argued that Mercury had incorporated the Amarillo and Lubbock BTA market numbers (namely, 264 for Lubbock and 013 for Amarillo) into the last three digits of some of its bids in order to send a "signal" to High Plains, which was also bidding in these markets.⁴ Mercury and High Plains were not members of a bidding consortium or other joint bidding arrangement identified pursuant to Section 1.2105(a)(2)(viii) of the Commission's Rules. High Plains contended that Mercury's bid signals were intended to warn High Plains that if it did not cease bidding for the Lubbock, Texas F block broadband PCS license, Mercury would retaliate by outbidding High Plains for the Amarillo, Texas F block broadband PCS license. High Plains indicated that once it ceased bidding for the Lubbock, Texas F block license, Mercury, in turn, ceased bidding for the Amarillo, Texas F block license. High Plains alleged that Mercury's bidding practice violated the Commission's anti-collusion rule set forth in Section 1.2105 of the Commission's Rules, 47 C.F.R. § 1.2105(c).

6. In its December 6, 1996 Opposition to High Plain's Emergency Motion, Mercury denied any violation of the Commission's Rules. Mercury maintained that the use of trailing numbers bids constituted nothing more than gamesmanship, *i.e.*, "letting competitors know what

² See 47 C.F.R. § 1.2105(a)(2).

³ See FCC Form 175, at Certification (4); *see also* 47 C.F.R. § 1.2105(a)(2)(ix).

⁴ See Paragraph 11, *infra*, for details of the bids placed by Mercury and High Plains in the Amarillo, Texas and Lubbock, Texas markets.

is important to you so that they don't respond destructively."⁶ Mercury further alleged that bid signaling was a "common practice" used by many other participants in the D, E, and F block auction.⁶ Moreover, in its response, Mercury maintained that bid signaling does not violate the Commission's Rules, arguing that its bidding behavior represents nothing more than "aggressive competition for licenses."⁷

7. On September 10, 1997, the Enforcement Division of the Wireless Telecommunications Bureau issued a letter of inquiry pursuant to Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b), asking Mercury to respond to a series of questions relating to their bidding activity during the PCS D, E and F block auction. The letter of inquiry requested that, among other things, Mercury describe, in detail, its use of various types of bid signalling including its use of "trailing digit" bid signaling, retaliatory bidding, and bid withdrawals during the auction as well as the reactions it got to those actions from other bidders.

8. Mercury responded to the Bureau's inquiry with a number of arguments. Although Mercury admitted to making bids with trailing numbers,⁸ it maintained that its use of trailing numbers did not constitute a communication of bidding strategy. Mercury claimed that there were various reasons for using a "Trailing Number" bid strategy such as confusing other bidders, facilitating internal tracking of bids, trapping other bidders into having their eligibility reduced and letting "the other [bidders] know that it would be expensive to continue to bid on a particular market."⁹ Mercury specifically denied that it ever used a Trailing Number bid strategy to signal any bidder that, if the other bidder stayed out of Market "X", Mercury would stay out of Market "Y", or to convey any information regarding what it would do or refrain from doing, or any other aspect of its bidding strategy.¹⁰

9. Mercury maintained that signaling bids generally are "a means through which bidders employed strategies designed to influence the perception by others of that bidder's

⁵ See Mercury's Opposition to High Plains' Emergency Motion for Disqualification ("Mercury's Opposition"), at 7, n. 11.

⁶ See Mercury's Opposition, at 7; *see also*, Letter dated September 17, 1997, from Mercury submitted in response to the Bureau's letter of inquiry ("Mercury's Response"), at 2.

⁷ *See, e.g.*, Mercury's Response, at 3; *see also*, Mercury's Petition for Reconsideration, dated September 22, 1997, at 2.

⁸ Mercury defined trailing number bids as "those bids that ended with numbers corresponding to the identification numbers of licenses being auctioned." Mercury's Response, at 1.

⁹ Mercury Response, at 1.

¹⁰ *See* Mercury's Response, at 2.

submission."¹¹ According to Mercury, this conduct reflects "the same type of bluffing, puffing and threatening as would occur in any auction setting."¹²

10. Following the auction, High Plains filed a Petition to Deny Mercury its D, E and F block licenses.¹³ Mercury filed its own Petition to Deny against High Plains that included much of the same argument offered in response to the Bureau's request.¹⁴ In addition Mercury argued that it takes two parties to "collude".¹⁵

11. Mercury ultimately was the high bidder for 32 BTA licenses.¹⁶ Evidence obtained through the Commission's investigation of this matter indicates that Mercury used trailing number signaling in connection with at least four of the markets it had won, including: Lubbock, Texas (F block); Eagle Pass, Texas (D block); McComb, Mississippi (F block); and San Angelo, Texas (F block).¹⁷ As seen below, Mercury incorporated BTA market numbers into the last three digits of at least 13 bids to signal to competing bidders Mercury's interest in certain markets:

- Mercury's bids placed for: Lubbock, Texas (BTA market number **264**) and Amarillo, Texas (BTA market number **013**):
 - BTA **264**(F block); round 117; Mercury's bid \$1,375,**013**
 - BTA **013**(F block); round 121; Mercury's bid \$1,615,**264**
 - BTA **264**(F block); round 123; Mercury's bid \$1,922,**013**
 - BTA **013**(F block); round 125; Mercury's bid \$1,866,**264**

¹¹ See Mercury's Response, at 2. Mercury defines signaling bids to include trailing number bids, jump bids, retaliatory bids and bid withdrawal activities.

¹² *Id.*

¹³ In Re Applications of Mercury PCS II, LLC For Authority to Acquire Various Licenses in the Broadband PCS Auction for Frequency Blocks D, E and F, Petition to Deny (March 21, 1997).

¹⁴ In Re Application of High Plains Wireless, L.P. for Personal Communications Service Licenses to Operate in Block F in the Amarillo, Texas BTA and in Block D in the Lubbock, Texas BTA, Petition to Deny (March 21, 1997). In the petition, Mercury claimed that High Plains had abused the Commission's process by filing pleadings in the captioned markets designed to intimidate Mercury.

¹⁵ *Id.* at 6.

¹⁶ See Appendix A, listing the 32 markets in which Mercury was determined the high bidder.

¹⁷ The Bureau withheld Mercury's licenses in nine markets. See *Mercury PCS II, LLC For Authority to Construct and Operate Broadband PCS Systems on Frequency Blocks D, E, and F, Memorandum Opinion and Order*, (released August 21, 1997)(Wireless Telecommunications Bureau). The Bureau's investigation had indicated that Mercury engaged in reflexive bid signaling in five markets in addition to the four noted above. These markets include: Ft. Walton Beach (F block), Pensacola, Florida (F block), Panama City, Florida (F block), Dothan, Alabama (F block) and Tallahassee, Florida (F block). The bid signals in these markets are not the subject of this Notice of Apparent Liability for Forfeiture.

--BTA **264**(F block); round 127; Mercury's bid \$2,326,**013**
--Mercury won the Lubbock (F block) license (BTA market 013);

- Mercury's bids placed for: Eagle Pass, Texas (BTA market number **121**); San Angelo, Texas (BTA market number **400**); and Victoria, Texas (BTA market number **456**):
 - BTA **400**(F block); round 159; Mercury's bid \$343,**121**;
 - BTA **121**(F block); round 161; Mercury's bid \$275,**400**;
 - and
 - BTA **400**(F block); round 161; Mercury's bid \$415,**456**;
 - BTA **456**(F block); round 163; Mercury's bid \$125,**400**;
 - BTA **400**(F block); round 165; Mercury's bid \$503,**456**;
 - Mercury won the Eagle Pass (D block) and San Angelo (F block) licenses (Mercury apparently switched from the BTA 121 F block license when the price exceeded the BTA 121 D block license);
- Mercury's bids placed for: McComb, Mississippi (BTA market number **269**) and Lake Charles, Louisiana (BTA market number **238**):
 - BTA **238**(F block); round 64; Mercury's bid \$442,**269**
 - BTA **269**(F block); round 66; Mercury's bid \$372,**238**
 - BTA **238**(F block); round 68; Mercury's bid \$512,**269**
 - Mercury won the McComb block license.

III. DISCUSSION

12. Given the Commission's reliance upon auctions as a primary licensing tool, the protection of the integrity of the auction process is of paramount importance. Consequently, we are concerned about bidding practices that can have the effect of compromising the integrity of the auction process. This is particularly true with regard to behavior that violates the anti-collusion rule in Section 1.2105(c) of the Commission's Rules.

13. Section 1.2105(c) of the Commission's Rules states in pertinent part:

[A]ll applicants are prohibited from cooperating, collaborating, discussing, or **disclosing in any manner** the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to Section 1.2105(a)(2)(viii).

47 C.F.R. § 1.2105(c)(1). [Emphasis added.] The purpose of the anti-collusion rule is to preserve the integrity and competitiveness of the auction process.¹⁸ The Commission specifically ruled that Section 1.2105(c) was applicable to broadband PCS auctions, finding that "nowhere [is the anti-collusion rule] more necessary than with respect to broadband PCS auctions, where we expect bidder interest to be high and the incentives to collude to be great."¹⁹

14. Thus, the Commission has expressly "prohibited bidders from discussing the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application."²⁰ The Commission has further stressed that any bidder found in violation of the anti-collusion rule faces potential sanctions of license revocation or forfeiture and may be prohibited from participating in future auctions.²¹

15. On December 20, 1996, after receiving a formal complaint concerning the use of bid signaling during the auction, the Commission issued, via the bidding software, a further announcement to all auction participants regarding this subject.²² The announcement noted that the Commission had received a complaint that the use of trailing digit bidding violated the anti-collusion rules. It went on to say that "[w]e have reached no determination on the merits of this argument. However, we invite all bidders to review the anti-collusion rule . . . and assess whether they are complying with the letter and spirit of the rule."²³ Bureau investigation of these allegations showed that trailing digit activities by Mercury stopped subsequent to this bidder announcement.

16. Based on the record before us, we conclude that Mercury apparently violated our anti-collusion rule in the PCS auction through its use of trailing digits to engage in "reflexive bid signaling". Reflexive bid signaling (through the use of trailing numbers) involves a bidder placing a bid in one market (market A) in which the final three digits of the bid (the trailing numbers)

¹⁸ See *Implementation of Section 309(j) of the Communications Act-Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2386-87 (1994) ("*Second Report and Order*") (anti-collusion rule adopted).

¹⁹ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5570-71 (1994) ("*Fifth Report and Order*") (making Section 1.2105(c) applicable to broadband PCS auctions).

²⁰ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fourth Report and Order, 9 FCC Rcd 6858, 6866 (1994) ("*Fourth Report and Order*"); see also *Fifth Report and Order*, 9 FCC Rcd at 5570-71.

²¹ *Fifth Report and Order*, 9 FCC Rcd 5532, 5570-71 (1994).

²² See Commission Announcement No. 47 of the D/E/F block Auction, entitled "Signaling Bids," dated 12/20/96, time 13:00:27.

²³ *Id.*

reflect the three-digit BTA number of a second market (market B) that it was targeting or a competing bidder was targeting. Then, within a short number of rounds, the bidder places a bid in the second market (market B) in which the final three digits of the bid reflect the BTA number of the first market (market A). These reflexive bids communicate different messages depending on the context of the bids. The signaling bidder could be communicating to competing bidders that they should stop bidding for the signaling bidder's targeted markets in exchange for which the signaling bidder would stop bidding in the competing bidder's targeted market. The reflexive bids could also communicate that a competitor's continued bidding in one of the signaling bidder's targeted markets would result in a "bidding war" in which the signaling bidder would continue to drive up the price in the competing bidder's targeted market. Finally, the reflexive bids could inform the competing bidders that both markets are being targeted by the signaling bidder.

17. In our view, Mercury's use of reflexive bid signaling with the use of trailing bid numbers during the PCS auction not only violated the plain language of our anti-collusion rule, which prohibits disclosure of bidding strategy, but also violated the spirit and intent of our rule by disclosing its bidding strategy in a manner that explicitly invited other auction participants to cooperate and collaborate on their bidding in specific markets. Mercury's very specific bid signals, coded within its bid and apparently aimed at particular markets had the potential to affect other auction participant's bidding strategy with a substantial likelihood of influencing the outcome of the auction.²⁴ In fact, the record indicates that this was precisely the effect in the Lubbock market.²⁵

18. Mercury denies that its use of trailing digit bids to engage in reflexive bid signalling violated our rules. Specifically, Mercury denies that it ever signalled or in any way communicated that "if another party ceased bidding on a market in which it had an interest, Mercury would cease bidding in a market of interest to the other bidder."²⁶ Instead it alleges that it "utilized the final three digits of its bids to: (a) gain separation from other bidders above and beyond minimum bid increments; (b) to avoid the so-called "fat finger" bid problem; and (c) to misdirect, bluff, threaten, and posture in relation to other bidders."²⁷

19. After full review of the record, we conclude that the evidence is to the contrary. In particular, we find it significant that the trailing bid digits were targeted to specific markets in a reflexive manner and that when High Plains ceased bidding in the Lubbock market, Mercury ceased bidding in the Amarillo market. Although the intent in using trailing digit bids may be

²⁴ Although Mercury argues that it never communicated with any other bidder regarding any meaning to be attributed to the trailing number variations, we do not believe it is necessary to have such direct communication in order to find an apparent violation of the rule.

²⁵ See Paragraph 9, *supra*.

²⁶ Mercury Response, at 2.

²⁷ Mercury's Response, at 7 (footnote omitted).

arguably ambiguous, the existence of the act and the negative results on the auction process are plainly evident.

20. Mercury asserts that if the Commission finds that Mercury's conduct violated the Commission's rules it must make the same finding vis-a-vis all of the other carriers identified as taking the same action.²⁸ Mercury further asserts that it has a listing of over 400 markets and associated PCS licenses won by other bidders "who unquestionably utilized bid signalling techniques that were identical to, or the functional equivalent of, those utilized by Mercury."²⁹ It appears that some of the bidding techniques that Mercury considers to be "functionally equivalent" are (i) retaliatory bidding;³⁰ (ii) jump bidding;³¹ and (iii) bid withdrawals.^{32 33}

21. In the three sets of markets listed at issue here, Mercury inserted specific information about its bidding strategy into the text of the bid itself. We believe Mercury's goal was to entice another bidder into a non-verbal agreement that would benefit both. By contrast, none of the other bidding techniques (jump bidding, bid withdrawal activities signalling or retaliatory bidding) involve such direct and specifically targeted offers of collusion. The other bidding techniques warn or punish competing bidders for undesired behavior, but there is no attempted meeting of the minds. For example, in the case of jump bidding, a bidder may be signalling to the class of bidders as a whole that a particular market is important to it. However, there is no *quid pro quo* offered. Similarly, in the case of retaliatory bidding, a bidder may punish another bidder for the second bidder's conduct in a market targeted by the first bidder, but the action occurs after the fact; there is no specific prospective offer to enter into a mutual agreement with regard to particular markets. Although some of these other bidding techniques may have had a similar general purpose to Mercury's use of reflexive trailing number bids, *i.e.*, to send a "signal" about bidders' intentions, we believe that it is appropriate to draw a distinction between Mercury's

²⁸ Mercury's Response, at 15.

²⁹ *Id.*

³⁰ "Retaliatory bidding" occurs when one bidder places a bid against a second bidder in another market because the second bidder was bidding in a market targeted by the first bidder, purportedly to punish the first bidder.

³¹ In cases of "jump bidding" a bidder increases an existing bid more than necessary, purportedly to demonstrate keen interest in a specific market.

³² "Strategic bid withdrawal" is a technique in which a bidder submits then quickly withdraws a bid, sometimes in the same round, to signal bidding intentions. "For example, a company that bids, withdraws and then rebids at the same level may be signalling to competitors that it has targeted that market and wants the competition to either withdraw from or cease bidding." Bowermaster and Sullivan, *Bid Signaling Pervasive in Auctions*, MSNBC (On Air)(1997), at 1- 2.

³³ Mercury's Response, at 2.

use of "reflexive bid signaling" and these other bidding techniques.³⁴ For these reasons, we believe that Mercury's conduct is particularly offensive to the integrity of our auctions processes and is prohibited by Section 1.2105(c) of the Commission's Rules, 47 C.F.R. § 1.2105(c).

22. We emphasize that this decision applies narrowly to the specific facts pending now before us. This Notice of Apparent Liability for Forfeiture is not intended to encompass other bidding practices and behavior not addressed here.

23. Under Section 503(b) of the Act, a forfeiture can be imposed against any person who willfully or repeatedly fails to comply with any rule of the Commission. For purposes of Section 503(b), the term "willful" means that the violator knew it was taking the action in question, regardless of whether there was an intent to violate the Rules.³⁵ The misconduct in question was both willful and repeated and, therefore, warrants the imposition of a forfeiture penalty under Section 503(b) of the Act.

24. Mercury's decision to use trailing number bids was clearly purposeful. It admitted that it intentionally inserted the market numbers into its bids which in turn had the effect of conveying information to other bidders. Additionally, Mercury's action was repeated because it placed a multitude of bid signals during the auction. Considering the circumstances presented, a forfeiture in the amount of \$50,000 for each bid signal placed by Mercury in the auction is appropriate. Thus, having determined that Mercury apparently placed 13 illegal bid signals, we find Mercury apparently liable for a forfeiture in the total amount of \$650,000. At this time we see no downward adjustment factors present under these circumstances.

IV. CONCLUSION

25. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, Mercury PCS II, LLC IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of six hundred fifty thousand dollars (\$650,000) for its willful and repeated violation of Section 1.2105(c), 47 C.F.R. §§ 1.2105(c). The amount specified was determined after consideration of the factors set forth in Section 503(b)(2)(D) of the Communications Act of 1934.

³⁴ We recognize that the language in our anti-collusion rule that prohibits disclosure of bidding strategy could be interpreted to prohibit any of these other types of bidding activities and, at the most extreme, even the act of bidding itself. However, this was clearly not the intent of our anti-collusion rule. We intend to examine and are considering changes to the anti-collusion rule in a pending proceeding. Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-60 (rel. Feb. 28, 1997) ("*Part 1 Proceeding*").

³⁵ See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

26. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that within 30 days of the release of this Notice, Mercury PCS II, LLC SHALL PAY the full amount of the proposed forfeiture OR SHALL FILE a response showing why the proposed forfeiture should not be imposed or should be reduced.

27. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The payment should note the File Number of the above-captioned proceeding. Payment by credit is acceptable and may be made by completing and submitting an FCC Remittance Advice (FCC Form 159) to Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482.

28. IT IS FURTHER ORDERED that a copy of this Notice SHALL BE SENT to Mercury PCS II, LLC by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

The Licenses of Which Mercury PCS II, LLC Was Determined To Be
The Winning Bidder in the Broadband PCS D, E, and F Block Auction

<u>Market</u>	<u>Block</u>	<u>File No.</u>	<u>Location</u>
B003	F	00114CWL97	Abilene, TX
B032	F	01284CWL97	Baton Rouge, LA
B040	F	01285CWL97	Big Spring, TX
B042	F	01286CWL97	Biloxi-Gulfport-Pascagoula
B052	F	01287CWL97	Bowling Green-Glasgo
B058	F	01288CWL97	Brunswick, GA
B087	F	01289CWL97	Clovis, NM
B115	F	01290CWL97	Dothan-Enterprise, AL
B121	D	01291CWL97	Eagle Pass-Del Rio, TX
B146	F	01292CWL97	Florence, AL
B154	F	01293CWL97	Ft. Walton Beach, FL
B159	F	01294CWL97	Gainesville, FL
B180	F	01295CWL97	Hammond, LA
B186	F	01296CWL97	Hattiesburg, MS
B191	E	01297CWL97	Hobbs, NM
B195	F	01298CWL97	Houma-Thibodaux, LA
B236	F	01299CWL97	Lafayette-New Iberia
B246	E	01300CWL97	Laurel, MS
B263	F	01301CWL97	Louisville, KY
B264	F	01302CWL97	Lubbock, TX
B269	F	01303CWL97	McComb-Brkhvn, MS
B296	F	01304CWL97	Midland, TX
B302	F	01305CWL97	Mobile, AL
B305	F	01306CWL97	Montgomery, AL
B327	F	01307CWL97	Odessa, TX
B340	F	01308CWL97	Panama City, FL
B343	F	01309CWL97	Pensacola, FL
B400	F	01310CWL97	San Angelo, TX
B415	F	01311CWL97	Selma, AL
B439	F	01312CWL97	Tallahassee, FL
B454	F	01313CWL97	Valdosta, GA
B467	F	01314CWL97	Waycross, GA

**Concurring Statement
of
Commissioner Susan Ness**

Re: Mercury PCS II, LLC, Notice of Apparent Liability for Forfeiture

I support the determination that Mercury PCS II is apparently liable for violating our spectrum auction rules. I share the majority's concern with maintaining the integrity of the bidding process and believe that the adoption of this Notice of Apparent Liability for Forfeiture ("Notice") will underscore that commitment. I write separately, however, to identify issues that I hope will be better illuminated before the Commission is called upon to make any final determination on this matter.

This is a case of first impression. It involves the application of a broad and general rule to a situation that is somewhat different from that contemplated when the rule was originally promulgated. An appropriate final determination, assuming that Mercury contests the Notice, will require close scrutiny of the text of the rule, of its underlying policy objectives, and of the bidding conduct of Mercury.

I believe the Commission has articulated a clear policy against collusion among applicants in our spectrum auctions. What is less certain is whether the bid signalling involved here transgressed the applicable rule. The rule at issue, 47 C.F.R. § 1.2105(c)(1), in pertinent part states that, except for circumstances not present in this case,

"[A]ll applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies. . . with other applicants"

The record evidence suggests that Mercury matched the last three digits of some of its bids to those of certain service areas in which it was bidding in an attempt to communicate to other parties something about its bidding strategy. One reasonable inference of this conduct is that Mercury was seeking to forge a tacit agreement with another bidder for that bidder to stop bidding in the identified market. But, as the Notice recognizes, there are a number of other possible interpretations of the intended meaning. I hope that the proceedings that ensue as a

result of this NALF will cast light on Mercury's intentions.

A related issue is whether a unilateral and possibly unsuccessful effort to influence the behavior of other bidders is impermissible. The caption of the rule characterizes it as a "prohibition of collusion" and the text of the rule itself may be read to proscribe only those activities which are conducted jointly "with other applicants." But the conduct here may have involved only a single applicant and was, in one sense at least, conducted entirely in the open. Again, I believe the Commission can better exercise its enforcement and rulemaking authority only after these considerations are more fully ventilated.

Finally, a determination that the alleged conduct violates the applicable rule may also call into question the myriad other ways in which bidders may have sought to communicate their interest in obtaining particular licenses. For example, "retaliatory bidding," "jump bidding," and "strategic bid withdrawal," as discussed in the Notice, to varying degrees all involve "disclos[ure of] bidding strategies." Is all such conduct sanctionable? If not, what are the distinctions and the principled basis for them? And what is the implication of the Commission itself having decided, after adopting the rule in question and before conducting this particular auction, to identify the particular parties responsible for each bid in each round of the auction?

Despite the foregoing questions, I concur in the decision to issue this Notice. Our action today reaffirms our commitment to the integrity of the auction process, even as it allows for the issues to be more completely briefed before the Commission must decide as a final matter whether this conduct merits the proposed penalty. In the meantime, I hope and expect that we will comprehensively review and, if necessary, clarify our anti-collusion rules within the pending Part One Rulemaking proceeding.

